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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-111

GLORIA M. LOHMAN,
Respondent,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

and

FEDERAL DEPOSIT INSURANCE CORPORATION and FEDERAL DEPOSIT INSURANCE COMPANY as STATUTORY RECEIVER OF CEDAR VALE NATIONAL BANK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

Not published as yet, they are Appendices A & B to Petition for Certiorari.

JURISDICTION AND QUESTIONS FOR REVIEW

Respondent agrees with the statement in the Petition.

STATEMENT

This action was once dismissed in the District Court for procedural reasons, because of the dereliction of duty by former attorneys for the plaintiff, the firm of F. Lee Bailey of Boston. The Trial Court entered its order "that plaintiff's cause of action and complaint against the defendant General American Life Insurance Company be, and the same is, hereby dismissed in all respects pursuant to Rules 37 and 41(b), Federal Rules of Civil Procedure." (Appendix 96-8). No judgment of dismissal was entered.

Subsequently, the same former attorneys for the plaintiff attempted to appeal from the Order of the Trial Court (even though no judgment was ever entered on that Order) and similarly botched the appeal. The consequence was that the Court of Appeals "ordered that this appeal be, and it is hereby, dismissed pursuant to Rule 30(b), Federal Rules of Appellate Procedure, and our local rules 8 and 13." (A. 103). (These rules, of course, are procedural rules and a dismissal based on them does not purport to reach the merits.) The appeal to the Court of Appeals was based entirely on technical grounds (supplementary appendix pages 1-2), alleging that the plaintiff had not

> "served on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of issues which he intends to present for review."

The Plaintiff had no knowledge of the misconduct of her attorneys until some time after the dismissal of the action in the District Court and the dismissal of the appeal.

The Trial Court's instructions as to the law of South Dakota included much more than the portion quoted in the Petition for a Writ of Certiorari herein. The pertinent portions of the instructions, including the brief portion referred to in the Petition for a Writ of Certiorari are as follows:

> "(3) That scene, explained as it has been in the evidence and as used in the arguments, is with the rules and observations in these instructions, your only guidelines, as you proceed towards and for a verdict of death by accident as it is covered in the policy, or a verdict by means other than accidental which would include the asserted defense of suicide.
>
> (4) As you give effect to all guidelines, you are instructed that the burden of proof is on Gloria, by a preponderance of the evidence, to show the death to have been caused by accident.
>
> (10) . . . 'burden of proof', as used in these instructions, is meant the obligation resting upon a party to prove the truth of an allegation made by him which is denied by the opposing party; (2) 'preponderance of the evidence' is meant the greater weight of the evidence or the value thereof. This is determined not alone by the greater number of witnesses testifying to or for a disputed fact, but is that evidence which in your judgment is the more credible and has to your minds a greater and more convincing force, . . .
>
> (13) Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as

stated in these instructions of the Court, and to apply the law so given to the facts as you find them from the evidence before you.

—You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

(16) Other rules to be applied may be summarized: . . . (2) Your verdict should be for the plaintiff, Gloria M. Lohman, and the additional defendants, Federal Deposit Insurance Corporation and Federal Deposit Insurance Corporation, as statutory receiver of Cedar Vale National Bank, if under this record you find William D. Lohman's death to have been caused by an accident, and otherwise for the defendant insurance company if you find his death not to have been caused by accident or under this record, a suicide; . . ."

ARGUMENT

1. A dismissal of an action on procedural grounds under Rules 37 and 41, Fed. R. Civ. P. and a dismissal of an attempted appeal under Rule 30(b), Fed. R. App. P., do not preclude a reopening of the judgment under Rule 60, Fed. R. App. P.

Obviously, neither the dismissal of the action nor the dismissal of the appeal was on the merits. Thus, there was no mandate from the Court of Appeals, and the District Court retained its discretion to act under Rule 60 (b). *7 Moore's Federal Practice 60.30(2)* at pages 424, 425. If the motion for relief under Rule 60(b) raises matters that are not within the compass of the mandate, the District Court clearly has the power to proceed with the 60(b) motion without leave of the Appellate Court. *Moore's Federal Practice 60.27(2)*.

Judgments disposing of a case without consideration of the merits, such as dismissals for failure to observe the rules and orders of the court, are considered against a background of general preference for disposition of cases on their substantive merits. *Moore's Federal Practice 60.27(2)*, page 362.

In addition to the foregoing, there are further reasons for the action taken by the District Court, which was affirmed by the Court of Appeals on appeal in the present action. The Court, in holding that its prior order was "void", obviously considered that, under the circumstances, including the fact that the attorneys had failed to properly represent her and the fault was not hers, the dismissal was tantamount to a denial of due process of law. As the Court of Appeals said,

"It is not our task in this case to consider anew whether or not the former order of dismissal was tantamount to a violation of due process but rather to ascertain whether or not the District Court abused its discretion in judging its former order void. The District Court clearly had the power to grant relief under Rule 60(b). The grant of relief involved an appraisal of the facts. Such an appraisal and grant of relief are largely within the discretion of the Trial Court. See Assman v. Fleming, 159 F.2d 332 (8th Cir. 1947); Conerly v. Flower, 410 F.2d 941 (8th Cir. 1969). There has been no clear showing of abuse of discretion. Farmers Co-op. Elevator Ass'n Non-Stock v. Strand, 382 F.2d 224 (8th Cir. 1967), cert. denied, 389 U.S. 1014 (1967). We therefore have no reason to find the District Court in error in vacating its former order of dismissal of the complaint."

In addition, the order of dismissal of the Trial Court was not a decision on the merits, because it stated other grounds for the order. The Court of Appeals so recognized. Citing *Madden* v. *Perry*, 264 F.2d 169, 175 (7th Cir. 1959), the Court of Appeals held that the District Court's Order for Dismissal for failure to answer interrogatories effectively "otherwise specified", and thereby precluded the operation of the provision of Rule 41(b), providing that an order is an adjudication upon the merits "unless the Court in its Order for Dismissal otherwise specifies, . . ."

The Court of Appeals held authoritatively that its dismissal of the first appeal was "on the technical ground urged in motion by General American", that such a dismissal "can hardly be considered a 'final judgment on the merits', and the mandate of the Court of Appeals dismissing plaintiff's appeal neither 'encompassed' nor 'disposed

of any of the issues subsequently considered by the District Court."

Further, as we urged in the Court of Appeals, the petitioner was not even prejudiced by the dismissal in the District Court since it dismissed only one party claiming relief in full against it (Gloria Lohman), and left intact the claim of the Federal Deposit Insurance Corporation for the same double indemnity funds.

Finally, the procedure of making application under Rule 60(b) was proper, *Stebbins* v. *State Farm Mutual Automobile Insurance Company,* 413 F.2d 1100, and *Mooney* v. *Central Motor Lines,* 222 F.2d 569. The Court of Appeals so held.

2. The instructions of the Trial Court as to burden of proof were eminently proper and correct.

Petitioner's grievance seems to be that the trial court refused to instruct in the exact language of its requested instruction or the exact language of *Headlee* v. *New York Life Insurance Company,* 12 NW2d 313. Of course, the Court is not obligated to use the exact language of a prior decision. *Roth* v. *Jelden,* South Dakota, 118 NW2d 20.

In *Headlee* there was a reversal because the Court instructed the jury that the burden of proof was upon the defendant to prove that the death was by self destruction. There is no hint of such an instruction here. On the contrary, Judge Beck's instructions numbers 4, 10, and 16, squarely place the burden of proof on the plaintiff.

Petitioner seems to have a claim that the jury should have had the opportunity to consider three verdicts, instead of two. Apparently petitioner believes that the jury should have been instructed to find either for the plaintiff, or for the defendant if its proof preponderated on the

factual issues, or for the defendant if the plaintiff failed to sustain her burden of proof. Such a position is novel, to say the least. It is also quite ridiculous, where the jury was clearly instructed that they must find for the defendant if *either* the evidence of the defendant preponderated *or* the plaintiff failed in her burden of proof.

There was no question of the death of William D. Lohman. There was likewise no question that the death was either by accident or suicide (in spite of some rather clumsy efforts to assert that the defendant did not claim death by suicide). The jury was clearly instructed that the burden of proof was on the plaintiff, that the verdict should be in her favor if the jury found that William D. Lohman's death was caused by an accident, and otherwise it was to be for the defendant. As the Court of Appeals said, "although defendant in theory did not expressly plead suicide as a defense, it clearly raised the issue of suicide by the presentation of its evidence and cross-examination throughout the trial. If the Court had found the evidence equally balanced between the accidental death and suicide, it would have been governed by the Court's repeated instruction that 'the burden is on Gloria (plaintiff) by a preponderance of the evidence, to show the death to have been caused by accident'."

The instructions, given by a District Judge who was a long time practitioner and Federal Judge in South Dakota, and approved by the Court of Appeals, were eminently correct under South Dakota law.

3. There is no due process question in this case.

The cases cited under paragraph 1 clearly show that the procedure in this case, particularly the reopening of the case under Rule 60(b), were proper, and the discussion under 2 above shows that the instructions were emi-

nently proper under South Dakota law as well as the Federal case law. This being so, citation to *Erie* v. *Tompkins*, 304 U.S. 64, is both inappropriate and puzzling, and it is apparent that there is no due process question in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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